NORISAM AKRAM MULLAH

v.

PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
AZAHAR MOHAMED JCA
BALIA YUSOF WAHI JCA
[CRIMINAL APPEALS NO: W-05-130-2011]
& W-05-131-2011]
5 APRIL 2013

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37(da) - Trafficking in dangerous drugs - Conviction and sentence - Appeal against - Prima facie - Whether court relied on ss. 2 and 37(da) - Whether two different findings made - Whether higher burden placed on appellants - Whether amounted to misdirection - Whether s. 37(da) presumption rebutted - Whether prejudicial to appellants - Common intention - Whether s. 34 Penal Code mentioned in grounds of judgment - Whether court invoked proviso to s. 60(1) Courts of Judicature Act 1964*

The appellants in both these appeals appealed against the decision of the High Court in convicting and sentencing them for trafficking in dangerous drugs. In brief, the appellants were arrested after a black plastic bag containing 4,749 grams of cannabis was found in their possession. The trial judge invoked the presumption under s. 37(da) of the Dangerous Drugs Act 1952 ('the Act') and upon hearing the defence, it was held that there was a failure to cast any reasonable doubt on the prosecution's case. It was argued by the first appellant that during the *prima facie* case, there was a dual finding made by the trial judge in relation to trafficking under ss. 2 and 37(da) of the Act. By doing this, it was asserted that a higher burden was placed on the appellants. Among the issues that arose for consideration herein were (i) whether the learned trial judge misdirected himself in finding a *prima facie* case when His Lordship relied on s. 2 of the Act and at the same time, on the trafficking presumption under s. 37(da) of the Act; (ii) whether the learned trial judge misdirected himself when His Lordship failed to rule whether the s. 37(da) presumption had been rebutted at the end of the defence case; (iii) whether the learned trial judge made a finding on common intention; (iv) whether s. 34 of the Penal Code was mentioned in the grounds of judgment; and (v) whether the court ought to invoke the proviso to s. 60(1) of the Courts of Judicature Act 1964 ('CJA').

Held (dismissing appeals; affirming convictions and sentences)
Per Balia Yusof Wahi JCA delivering the judgment of the court:

(1) At the close of the persecution's case, the learned trial judge had merely decided that a *prima facie* case had been established under the two possibilities, namely, with the aid of the presumption under s. 37(da) of the Act and trafficking under the definition in s. 2 of the Act. However, based on the tenor of the grounds of judgment, there was only one finding made by the trial judge which was in relation to trafficking, and that was by invoking the presumption under s. 37(da) of the Act. After hearing the defence, His Lordship made a positive finding that there was trafficking under s. 37(da) and thus, the learned judge did not make two different findings of trafficking against both appellants. (paras 19, 24 & 26)

(2) Nowhere in the judgment did the learned trial judge rule on rebuttal of the presumption under s. 37(da) of the Act. Unlike in *Mohamad Radhi Yaakob v. PP*, the defence of the appellants were one of mere denial. The trial judge, *inter alia*, (i) had given a maximum evaluation of all the evidence before him and came to the right conclusion; and (ii) had adequately considered and judicially appreciated the defence of both the appellants. The failure of the trial judge to specifically state the phrase of failing to rebut the presumption on the balance of probabilities, could not, in the circumstances of this case, be said to be a misdirection and fatal. Further, the appellants were not in any way prejudiced when the trial judge found that they had failed to cast a reasonable doubt on the prosecution's case. (paras 33, 41 & 48)

(3) It is trite that the existence of common intention is a question of fact and may be proved by way of inference from the circumstances of the case and the proved facts. The learned trial judge did make a finding on s. 34 of the Penal

Code. Although His Lordship never mentioned s. 34 in the judgment, his reference to common intention ought to be understood as being reference to s. 34. After having examined the factual matrix of this case, common intention between the two appellants was proven. (paras 61, 62 & 63)

(4) There was no misdirection by the learned trial judge and as such, the invocation of the proviso to s. 60(1) of the CJA did not arise at all. Even if there was a misdirection, the instant appeals would be an appropriate and proper instance to invoke the said proviso. (para 71)

***Bahasa Malaysia** Translation Of Headnotes*

Perayu-perayu dalam kedua-dua rayuan di sini telah merayu terhadap keputusan Mahkamah Tinggi dalam mensabitkan dan menjatuhkan hukuman ke atas mereka atas kesalahan mengedar dadah berbahaya. Secara ringkas, perayu-perayu telah ditangkap selepas satu beg plastik hitam dijumpai dalam milikan mereka yang mengandungi 4,749 gram kanabis. Hakim perbicaraan telah membangkitkan anggapan di bawah s. 37(da) Akta Dadah Berbahaya 1952 ('Akta') dan selepas mendengar pembelaan, diputuskan bahawa terdapat kegagalan untuk membangkitkan keraguan munasabah terhadap kes pendakwaan. Dihujahkan oleh perayu pertama bahawa semasa kes *prima facie*, hakim perbicaraan telah membuat dua penemuan berkaitan dengan pengedaran di bawah ss. 2 dan 37(da) Akta. Dengan itu, adalah dihujahkan bahawa satu beban yang tinggi diletakkan atas kedua-dua perayu. Antara isu-isu yang dibangkitkan untuk pertimbangan di sini adalah (i) sama ada yang arif hakim perbicaraan telah tersalah arah dalam memutuskan satu kes *prima facie* apabila beliau bergantung kepada s. 2 Akta dan pada masa yang sama, terhadap anggapan pengedaran di bawah s. 37(da) Akta; (ii) sama ada yang arif hakim perbicaraan tersalah arah apabila beliau gagal memutuskan sama ada anggapan di bawah s. 37(da) telah dipatahkan pada akhir kes pembelaan; (iii) sama ada yang arif hakim perbicaraan telah membuat dapatan mengenai niat bersama; (iv) sama ada s. 34 Kanun Keseksaan dinyatakan dalam alasan penghakiman; dan (v) sama ada mahkamah sepatutnya membangkitkan proviso di bawah s. 60(1) Akta Mahkamah Kehakiman 1964 ('AMK').

Diputuskan (menolak rayuan-rayuan; mengesahkan sabitan-sabitan dan hukuman-hukuman)
Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:

(1) Semasa penutupan kes pendakwaan, yang arif hakim telah memutuskan bahawa satu kes *prima facie* telah dibuktikan di bawah dua kemungkinan, iaitu, dengan anggapan di bawah s. 37(da) Akta dan pengedaran di bawah definisi s. 2 Akta. Berdasarkan pengertian alasan penghakiman, terdapat hanya satu penemuan yang dibuat oleh hakim perbicaraan yang berkaitan dengan pengedaran, dan ia adalah dengan membangkitkan anggapan di bawah s. 37(da) Akta. Selepas mendengar pembelaan, yang arif hakim telah membuat dapatan positif bahawa terdapat pengedaran di bawah s. 37(da) dan oleh itu, yang arif hakim tidak membuat dua penemuan berlainan bagi pengedaran terhadap kedua-dua perayu.

(2) Tidak terdapat dalam penghakiman bahawa yang arif hakim telah memutuskan berkenaan pematahan anggapan di bawah s. 37(da) Akta. Berbeza daripada *Mohamad Radhi Yaakob v. PP*, pembelaan perayu-perayu adalah penafian semata-mata. Hakim perbicaraan, antara lain, (i) telah membuat penilaian maksimum terhadap kesemua keterangan dan membuat kesimpulan yang betul; dan (ii) telah mempertimbangkan secara memadai dan menghargai secara kehakiman pembelaan kedua-dua perayu. Kegagalan hakim perbicaraan untuk menyatakan secara spesifik frasa kegagalan untuk mematahkan anggapan atas imbangan kebarangkalian, tidak boleh, dalam keadaan kes ini, dikatakan sebagai suatu salah arahan dan menjejaskan. Tambahan, perayu-perayu tidak diprejudiskan dalam apa jua cara apabila hakim perbicaraan memutuskan bahawa mereka telah gagal membangkitkan keraguan munasabah terhadap kes pendakwaan.

(3) Adalah matan bahawa kewujudan niat bersama adalah suatu persoalan fakta dan boleh dibuktikan melalui anggapan daripada keadaan kes dan fakta-fakta yang telah dibuktikan. Yang arif hakim telah membuat dapatan atas s. 34 Kanun Keseksaan. Walaupun yang arif hakim tidak menyatakan s. 34

dalam penghakiman, rujukan beliau kepada niat bersama sepatutnya difahami sebagai rujukan kepada s. 34. Selepas meneliti matriks fakta kes ini, niat bersama antara perayu-perayu telah pun dibuktikan.

(4) Tiada salah arah yang dilakukan oleh yang arif hakim perbicaraan dan oleh itu, pemakaian proviso kepada s. 60(1) AMK langsung tidak berbangkit. Jikalau terdapatnya salah arahan, adalah sesuai dan wajar untuk membangkitkan proviso tersebut bagi rayuan-rayuan di sini.

Case(s) referred to:

Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC ***(refd)***
Jones v. National Coal Board [1957] 2 QB 55 ***(refd)***
Mahbub Shah v. Emperor AIR 1945 PC 118 ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(dist)***
Nur Azmi So'aib v. PP [2013] 1 CLJ 563 CA ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Ku Yahya Ku Bahari & Anor [2002] 1 CLJ 113 CA ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(dist)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 60(1), 92(1)
Criminal Procedure Code, s. 112
Dangerous Drugs Act 1952, ss. 2, 37(d), 37(da)
Penal Code, s. 34

(Criminal Appeal No: W-05-130-2011)
For the 1st appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Mangaiarkarasi; DPP

(Criminal Appeal No: W-05-131-2011)
For the 2nd appellant - Lee Teong Hooi; M/s Chim Yiam Lee Tan & Assocs
For the respondent - Mangaiarkarasi; DPP

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-32-2009]

Reported by Kumitha Abd Majid

JUDGMENT

Balia Yusof Wahi JCA:

[1] The appeal by the first appellant raises an interesting issue which commonly arise in drug trafficking cases in the courts below. Two grounds of appeal were canvassed before us by both the appellants and these grounds are as follows:

(a) that the learned trial judge misdirected himself when His Lordship relied on s. 2 of the Dangerous Drugs Act 1952 (the Act) and at the same time on the trafficking presumption under s. 37(da) to find a *prima facie* case; and

(b) that the learned trial judge misdirected himself when His Lordship failed to rule whether the s. 37(da) presumption had been rebutted at the end of the defence case.

[2] The two appellants were jointly charged for an offence of trafficking in dangerous drugs and the charge against them in its original language reads as follows:

> Bahawa kamu bersama-sama pada 19hb Januari, 2009, jam lebih kurang 2.30 pagi di kawasan Simpang Tiga sekitar Blok H, Flat PKNS Jalan Kuching dalam daerah Sentul, Wilayah Persekutuan, Kuala Lumpur, di dalam meneruskan niat bersama kamu berdua, telah mengedar dadah merbahaya iaitu 4,749 gram cannabis, oleh yang demikian kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta Dadah yang sama dibaca bersama Seksyen 34 Kanun Keseksaan.

[3] Briefly, the facts of the case may be summarised as follows:

[4] On 19 October 2009 at about 1.30am, SP4, one Insp Ahmad Fadli bin Azhar and his team took up ambush position at Block H, Flat PKNS, Jalan Kuching, Kuala Lumpur. After about an hour, SP4 saw a taxi bearing registration No. HWC 613 (the taxi) arrived at the said Block H and stopped there. In the taxi were a male driver and a female passenger. The female passenger was seated at the front passenger seat.

[5] As soon as the taxi stopped, a man approached the taxi and took out from its boot a black plastic bag. SP4 and his men immediately rushed towards the taxi and the same time, SP4 shouted “police”. The man who held the plastic bag quickly threw the same and ran towards a field nearby. He was later apprehended. The man who threw the plastic bag was later identified as the first appellant herein while the taxi driver was the second appellant. The black plastic bag was found to contain five compressed slabs later confirmed to be 4,749g of cannabis. Apart from the two appellants, the female passenger was also arrested. She was known as Nelli. Nelli was not brought to court.

[6] Evidence was led to show that the second appellant attempted to escape by reversing the taxi but was not successful. While reversing the taxi, the second appellant almost collided into one of the members of the police party. A gunshot was then fired at the tyre of the taxi and when the taxi stopped, SP4 ordered the second appellant and Nelli to come out of the taxi. They complied.

[7] Both the appellants were found guilty as charged and accordingly convicted and sentenced to death by the High Court Judge.

[8] Both the appellants have filed separate appeals, hence the two appeals before us, and with the concurrence of all parties concerned, these two appeals were heard together. We refer to the appellant in Appeal No: W-05-130-2011 as the first appellant and the appellant in Appeal No: W-05-131-2010 as the second appellant. In the court below, the first appellant was the first accused while the second appellant was the second accused.

[9] We heard the appeals, wherein at the conclusion of the hearing we unanimously dismissed both the appeals. We now give our reasons.

[10] After having found that both the appellants had actual possession of the impugned drugs, in coming to his conclusion that there was established a *prima facie* case of trafficking, the learned trial judge stated at p. 218 of the appeal record thus:

> As for the trafficking, having been in possession of the drugs and being aware of its nature, there was also positive evidence that the accused act fell within the meaning of 'trafficking' as defined in section 2 of the DDA, 1952 which states:
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> > 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.' (emphasis added)

> The accused was fully aware of the contents in the yellow plastic bag (exhibit P8) which contained the 5 packages (exhibits P9, P11, P13, P15 and P17 respectively). There was no evidence to show the context to be otherwise that the 2nd accused was transporting, carrying, sending and delivering, all the while knowing what he was doing. Knowingly, transporting, carrying, sending and delivering the drugs with him from one place to another namely to Block H, PKNS flat, Jalan Kuching, Kuala Lumpur where the 1st accused was to collect the black plastic bag. Both the accused knew the nature of the drugs as being dangerous drugs, to wit cannabis. There was a strong *prima facie* evidence of trafficking in dangerous drugs.

[11] Having stated as above, the learned trial judge went on and further found as follows:

> The Court in this respect also made a finding that in view of the overwhelming evidence of direct physical possession of the drugs by the accused, would invoke the presumption under section 37(da) in view of the fact that the net weight of the cannabis of 4749 grams far exceeded the minimum threshold net weight for trafficking of cannabis which is 200 grams. Surely given the net weight of the drugs was 4749 grams, it could not possibly meant for own use but for trafficking.

[12] Learned counsel for the first appellant, Mr Hisyam Teh Poh Teik in his usual candour submitted before us that the learned trial judge has seriously erred in so doing. By making two findings at the same time, Mr Hisyam argued that his client had been placed in a very disadvantageous position in that he has been cast with a very high burden to prove his innocence. Not only that he has to rebut the presumption under s. 37(da) on a balance of probabilities, he was at the same time saddled with the burden of raising a reasonable doubt. This error is so fundamental that the appeal should be allowed even on this ground alone, Mr Hisyam says.

[13] Learned counsel further submitted that the only damning evidence against the first appellant was that he merely picked up the bag containing the impugned drugs from the boot of the taxi and this can never be trafficking. It is not in the definition under s. 2 of the Act.

[14] We have carefully perused the records of appeal and sieved through the evidence and came to the conclusion to agree with the learned trial judge that there was a *prima facie* case against both the appellants. We are in agreement with the learned trial judge that based on the factual matrix of the case, actual possession was proven. We will elaborate further on the issue of possession when dealing with the appeal brought by the second appellant in the later part of this judgment.

[15] In finding a *prima facie* case at the close of the prosecution case, the learned trial judge made a finding as what we have quoted in the two passages earlier. At that stage, the learned trial judge was of the view that not only a *prima facie* case of trafficking under s. 2 of the Act had been established but also a *prima facie* case of trafficking by invoking the presumption under s. 37(da) was also made out.

[16] It appears that the learned trial judge at that stage was satisfied that there was this dual possibilities against the appellants and there upon called them to enter their defence. It is this dual finding of trafficking under s. 2 and under s. 37(da) of the Act which is being frowned upon by learned counsel for the first appellant.

[17] Apart from saying that this is obviously wrong and illegal, regrettably counsel could not offer us much assistance to support his contention. Learned counsel merely submitted that because of such a finding by the learned trial judge, a higher burden was cast on both the appellants.

[18] We pause here to ask whether both the appellants were indeed placed in such a predicament. In our considered view, they were not. We will elaborate why.

[19] At the stage of the close of the prosecution's case, it appears that the learned trial judge has kept an open mind and had merely decided that a *prima facie* case has been established under the two possibilities namely, with the aid of the presumption under s. 37(da) of the Act and trafficking under the definition in s. 2 of the Act.

[20] In this instance, we find it necessary once again to refer to the passage from the judgment on the so-called dual finding of trafficking by the learned trial judge. At pp. 218 - 219 of the appeal record, His Lordship stated:

> As for the trafficking, having been in possession of the drugs and being aware of its nature, there was also positive evidence that the accused act fell within the meaning of 'trafficking' as defined in section 2 of the DDA, 1952 which states:
>
> > *trafficking includes the doing or any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.* (emphasis added)
>
> The accused was fully aware of the contents in the yellow plastic bag (exhibit P8) which contained the 5 packages (exhibits P9, P11, P13, P15 and P17 respectively). There was no evidence to show the context to be otherwise that the 2nd accused was **transporting, carrying, sending** and **delivering**, all the while knowing what he was doing. Knowingly, transporting, carrying, sending and delivering the drugs with him from one place to another namely to Block H, PKNS flat, Jalan Kuching, Kuala Lumpur where the 1st accused was to collect the black plastic bag. Both the accused knew the nature of the drugs as being dangerous drugs, to wit cannabis. There was a strong *prima facie* evidence of trafficking in dangerous drugs.
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> The Court in this respect also made a finding that in view of the overwhelming evidence of direct physical possession of the drugs by the accused, would invoke the presumption under section 37(da) in view of the fact that the net weight of the cannabis of 4749 grams far exceeded the minimum threshold net weight for trafficking of cannabis which is 200 grams. Surely given the weight of the drugs was 4749 grams, it could not be possibly meant for own use but for trafficking.
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> In the light of the principles set out in the authorities referred to and reproduced above, the Court was satisfied that on the totality of the evidence before the Court, the prosecution had succeeded in proving a *prima facie* case against the 1st and 2nd accused. (emphasis added)

[21] One must not fail to realise that the learned trial judge never made any specific finding of transporting, delivering, carrying or sending but merely gave emphasis on those words. It could be one or the other, or all of them. His Lordship merely said that both the appellants were 'trafficking' under s. 2 of the Act.

[22] Having done so, the learned trial judge went on to find that there was also trafficking by invoking the s. 37(da) presumption. Mr Hisyam submitted that the learned trial judge did not make a finding in the alternative as it was never indicated as such in his written grounds of judgment.

[23] We say that it was rather unfortunate for the learned trial judge to have found in the manner as His Lordship has so stated. While the evidence may be overwhelming and can fit both findings made by His Lordship, we however strongly feel that it was really unnecessary for the learned trial judge to do so. We accept that judgment writing is a matter of style. Each judge has his or her own style of expression. While we are looking for speaking judgments, judges at the same time must be wary of speaking and saying too much and more than necessary. It will give rise to a lot of speculations and open to many criticisms. Denning LJ in *Jones v. National Coal Board* [1957] 2 QB 55 has quoted Lord Chancellor Bacon as saying that an over speaking judge is no well-tuned cymbal. Likewise, we feel a judgment should also never be over speaking, so to speak. We pause to ponder whether the learned trial judge was being over cautious in making this dual finding in the belief that the prosecution has made out a water tight case against both the appellants.

[24] However, reading and judging from the tenor of the grounds of judgment of the learned trial judge, we are satisfied that there was only one finding made by His Lordship relating to trafficking, and that was by invoking the presumption under s. 37(da) of the Act.

[25] Our view is fortified by the fact that after hearing the defence, His Lordship made a positive finding that there was trafficking under s. 37(da) of the Act. At p. 226 of the appeal record, the learned trial judge found and stated as follows:

> It is the finding of the Court that the cumulative force of the facts adduced by the prosecution had convinced me that both the accused had *mens rea* possession and the **case came within the section 37(da) of DDA, 1952** so that both accused were presumed to be traffickers of the drugs in question. The Court cannot accept the defence evidence as they were mere denial without any proof. (emphasis added)

[26] Again and finally, in the concluding paragraph of His Lordship's judgment at pp. 230 - 231 of the appeal record, the learned trial judge held:

> In conclusion, the Court having carefully scrutinized the evidence by the prosecution and the defence in totality and subjecting it to a maximum evaluation, was satisfied that the prosecution had proven its case against the 1st and 2nd accused as per charge beyond reasonable doubt in that both accused were held to be in physical possession, custody and control of the black plastic bag exhibit P8 and the contents therein in exhibits P9, P11, P13, P15 and P17 respectively. The 1st and 2nd accused also had knowledge of the drugs found exhibit P8. **The Court also invoked the presumption under section 37(da) of the DDA, 1952** in view of the fact that the net weight of the drugs found was 4749 grams which was in excess of the minimum of 200 grams for cannabis which could not possibly be for their own consumption but for trafficking. The Court held that the defence had failed to cast any reasonable doubt on the prosecution's case and held the 1st and 2nd accused guilty as charged and hereby sentenced the 1st and 2nd accused to death by hanging. (emphasis added)

[27] From the above passages, we are satisfied that the learned trial judge did not make two different findings of trafficking against both the appellants. His Lordship only found that both the appellants were guilty of trafficking in dangerous drugs under the provision of s. 37(da) of the Act.

[28] In the circumstances, we cannot agree that both the appellants were put in a predicament of having to discharge their burden of rebutting the presumption on a balance of probabilities as well as raising a reasonable doubt on the prosecution's case. They only carried the burden of rebutting the presumption on the balance of probabilities.

[29] Moving on to the second ground of the first appellant's appeal, it was submitted before us that the learned trial judge has erred in failing to rule whether the appellants had rebutted the s. 37(da) presumption.

[30] Mr Hisyam Teh Poh Teik submitted before us that it is incumbent upon the learned trial judge to make a ruling whether both the appellants had rebutted the presumption. Mr Hisyam has rightly said so because His Lordship had found that the s. 37(da) presumption has been invoked against the appellants.

A **[31]** Relying on *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705, Mr Hisyam submitted that the failure to rule on the rebuttal of presumption is a serious misdirection and is fatal. A passage from the judgment of Edgar Joseph Jr SCJ at p. 720 of the report was referred to us and it reads:

B

> This brings us to the next point in this appeal. Nowhere in his judgment did the Judge direct attention to the statutory presumption as to possession (section 37(d)) and trafficking (section 37(da)), and as a result, he made no finding as to whether the defence had rebutted the same. In our view, this was C a misdirection in law by way of non-direction having regard to the following passage in the judgment of Azmi SCJ so in *Mohammad Radhi bin Yaakob v. PP* [1991] 3 MLJ 169, at p. 172 para 1:
>
> > D In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the Court to consider whether on the balance of probabilities, the evidence of the defence has rebutted the statutory presumption of trafficking under section 37(da) as a separate exercise even though the Court is satisfied on E balance that the presumption of possession under section 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.
>
> Having said that, we would add there may well be cases where F because of the absolutely overwhelming nature of the affirmative evidence led by the prosecution, there is no need for resort to be had to the statutory presumptions aforesaid, but even in such a case, we consider that the trial Court should specifically so find.

G **[32]** Learned counsel also relied on two other authorities which speak in a similar vein, namely, *Tan Boon Kean v. PP* [1995] 4 CLJ 456 and *PP v. Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113.

[33] In this respect we would once again refer to the concluding paragraph of the learned trial judge's written judgment which we H have quoted *in extenso* just a while ago. At the risk of being repetitious, we note that the learned trial judge had invoked the presumption under s. 37(da) of the Act to bring home the offence of trafficking in dangerous drugs and upon hearing the defence held that the defence had failed to cast any reasonable doubt on I the prosecution's case. Both the appellants were convicted and sentenced to death by hanging. Nowhere in the judgment did the learned trial judge rule on rebuttal of the presumption. Not a word was said on rebuttal of presumption.

[34] In considering the defence, the learned trial judge has rightly relied on the case of *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 and quoted the relevant passage at p. 2076 of the report saying:

> It is a well established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. To earn an acquittal at the close of the case for the prosecution under section 173(f) or section 180 of the Criminal Procedure Code, the Court must be satisfied that no case against the accused has been made out which if unrebutted would warrant his conviction (*Munusamy v. PP* [1987] CLJ (Rep) 221). If defence is called, the duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt.

[35] The learned Deputy Public Prosecutor, Ms Mangaiarkarasi submitted that it is not so much of the words used by the trial judge but rather the application of the test. For that matter, Mohd Azmi SCJ in *Mohamad Radhi Yaakob v. PP* (*supra*) itself has stated that:

> To satisfy this test it is not so much the words used by the Judge, but rather the actual application of the test to the facts of the case that matters.

[36] In *Nur Azmi So'aib v. PP* [2013] 1 CLJ 563 this court has held:

> ... the form of words used by the learned judicial commissioner in his judgment is a matter of his choice. A judgment is the expression of the view of a judge arrived at after due deliberation of the evidence and of the submissions advanced before him. But judges write their judgments in their own style. Each judge has

> an individual manner or style of expression. For that reason in the context of the present case, what is most important is whether or not in substance and effect the learned judicial commissioner in his judgment had adequately considered and judicially appreciated the defence of the appellant which was that he was an innocent carrier of the bag in question with no knowledge of the cannabis that was in the said bag. This, ultimately, is the test: whether or not the learned judicial commissioner had in his judgment addressed his mind to this critical issue ...

[37] The Federal Court has affirmed the decision in the abovementioned case.

[38] *Mohamad Radhi*'s case sets out that unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether or not on a balance of probability, in the evidence, the defence has rebutted the statutory presumption of trafficking under s. 37(da) as a separate exercise even though the court is satisfied on balance that the presumption of possession under s. 37(d) has not been rebutted. The defence in *Mohamad Radhi*'s case was not a mere denial but that he was in possession of the bag in which the offending drugs were found and that he was an innocent and a momentary carrier and called several witnesses in support of that defence.

[39] In that case, the failure of the trial judge to do so was held to be a misdirection and was fatal to the conviction.

[40] The position is very different in the instant appeals.

[41] The defence of the first appellant (and also that of the second appellant) in the instant appeal is one of mere denial.

[42] The defence of the first appellant was that on 18 January, 2009, at about 11.30pm he went to see his friend whom he called 'Ah Long' at a flat at Jalan Kuching to talk about job opportunities. The real name of Ah Long was Mohd Najib. Ah Long stayed at the 1st floor of the flat. At about 2am in the morning, he was still with Ah Long at the flat. Thereafter, he wanted to go back to his place and went down to the ground floor. A taxi passed by and he stopped it and asked whether the driver could send him to Taman Batu Permai, Jalan Ipoh.

[43] At the time when he stopped the taxi, there was a lady seated at the front passenger seat next to the driver. As he was about to get into the taxi, all of a sudden he was dragged from behind and he fell on the road. He heard a loud bang. There were about three or four persons in plain clothes whom he did not know and he was handcuffed and taken inside a car and driven to the police station. He denied opening the boot of the taxi. He also denied that when the police identified themselves as police officers, he threw away the black plastic bag and running towards the field. He further denied he was shown the contents in the black plastic bag which contained the drugs.

[44] During cross-examination, he denied that Ah Long did not exist. He denied that there was a struggle during his arrest and denied knowing the second appellant.

[45] The second appellant stated in his defence that at the material time he was a taxi driver. He had a lady friend by the name of Nelli and on 18 January 2009 after work, he went out with her for supper. After supper, he and Nelli went for a drive along Jalan Kuching and said if there was a passenger he would pick him or her up. True enough, his taxi was stopped by the first appellant whom he did not know and picked him up. Suddenly a group of men without any shirts on but wearing only trousers came. In this regard, we note that the first appellant said they were in plain clothes. He thought there was a fight and he heard a gunshot. They told him to come out of his taxi and he was taken to a police station. They told him there were drugs in the boot of the taxi. He did not know anything about the drugs. As a taxi driver, the second appellant further stated when passengers wanted to put anything in the boot, they just have to knock on the boot and he will open the boot by pulling the lever from inside the taxi. He would not know what were the items put by his passengers in the boot because he did not get down to see. The second appellant also said he would not know whether there was any item left behind by the passengers in the boot of his taxi on the 18 January 2009.

[46] During cross-examination, the second appellant changed his story and said that he was pulled out of his taxi by the unidentified men. He denied reversing his taxi but confirmed the police shot its front tyre.

[47] Upon evaluating the defence evidence and bearing in mind the principles set out in *Mohamad Radhi*'s case, the learned trial judge made the finding as His Lordship did.

[48] We agree with the finding of the learned trial judge that upon maximum evaluation of the prosecution case and then of the defence, it gave the same result, ie, that the prosecution had proved its case beyond all reasonable doubt that both the appellants were trafficking in drugs as per the charge. We are satisfied that the learned trial judge had given a maximum evaluation of all the evidence before him and came to the right conclusion. We are also satisfied that in substance and effect, His Lordship in his judgment had adequately considered and judicially appreciated the defence of both the appellants. The defence has failed to rebut the presumption. The failure of the learned trial judge to specifically state the magic phrase of failing to rebut the presumption on the balance of probabilities, could not in the circumstances of this case be said to be a misdirection and fatal. We are further of the view that both the appellants were not in any way prejudiced when the learned trial judge found that they have failed to cast a reasonable doubt on the prosecution's case. This is a lower burden than having to discharge that burden on a balance of probabilities.

[49] In respect of the appeal by the second appellant (Appeal No: W-05-131-2011), learned counsel, Mr Lee Teong Hooi put up two main grounds during his oral submissions, namely on the issue of possession and common intention. Our perusal of his written submissions however indicated that he went on mostly on the issue of possession only. Learned counsel admitted that the issue of common intention was never part of his grounds in the petition of appeal.

[50] We will deal with the issue of possession first.

[51] Exhibit P8 is the black plastic bag which contained the impugned drugs. No finger print of the second appellant was found on it and neither any DNA sampling was done. The second appellant did not open the boot of the taxi himself. He opened it by using a lever from the driver's seat. He never knew what was inside the boot of the taxi and did not know the contents of the said bag. As stated in his evidence, he would not have known whether the said bag could have been left there by his passengers. Because of these reasons, it was submitted before us that the second appellant can never be held to be in custody and control of the said exh. P8 and to have any knowledge as to its contents. Possession has not been proven against the second appellant. Essentially these were the arguments of learned counsel.

[52] Furthermore, according to counsel, exh. P39 which was a police statement made under s. 112 of the Criminal Procedure Code did not show that the second appellant had any knowledge about the drugs. Exhibit P39 was recorded from Nelli, the girl companion of the second appellant who went for a late night drive with him. Nelli was untraceable and was not called as a prosecution witness but her 112 statement was admitted as part of the prosecution's evidence.

[53] We found no merits in the above said arguments. The learned trial judge has found both appellants to have *mens rea* possession. We refer to p. 225 of the appeal record and it says this:

> In coming to the conclusion that both the accused had the *mens rea* possession, I have analysed the surrounding circumstances of the case which related to the demeanour of both the 1st and the 2nd accused when arrested by SP4 and SP6 respectively. In so far as the 1st accused immediately after he had held up exhibit P8 and after been shouted at by the police, threw away P8 and took to his heels and after a short chase was arrested by SP6. As for the 2nd accused, immediately after his taxi was ambushed, he reversed his taxi almost hit a member of the raiding party resulting in a shot being fired at one of the tyres.
>
> It is the finding of the Court that the cumulative force of the facts adduced by the prosecution had convinced me that both the accused had *mens rea* possession and that the case came within the section 37(da) of DDA, 1952 so that both accused were presumed to be traffickers of the drugs in question.

[54] Earlier in the same page of the appeal record, the learned trial judge quoted a passage from the judgment of the Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 on what *mens rea* possession means. It says:

> The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case' *Saad Ibrahim v. PP* [1968] 1 MLJ 158 per Yong J.

A **[55]** On the issue of knowledge about the drugs contained in the black plastic bag exh. P8, the learned trial judge has correctly made an inference of such knowledge as can be gleaned from His Lordship's judgment at p. 217 of the appeal record. It states:

> B ... there were ample evidence to show that not only did the 1st and 2nd accused have physical custody, control and possession of the black plastic bag exhibit P8 and also its contents P9, P11, P13, P15 and P17 respectively, both the accused had knowledge by virtue of the overt act in resisting arrest by running away and attempting to reverse the taxi. The accused must have known the C contents in the black plastic bag (exhibit P8) at the time of their arrest as the black plastic bag (P8) was not sealed or covered and it did not require much effort to uncover the contents exhibits P9, P11, P13, P15 and P17 respectively which contained cannabis. Hence it would not be farfetched for the Court to infer that both D the accused had all the time to see and ascertain the contents of exhibits P9, P11, P13, P15 and P17 respectively. To my mind the cumulative conduct of the 2nd accused in transporting P8 in the taxi and the 1st accused act of taking out the black plastic bag from the boot of the taxi and their respective attempt to escape and the 1st accused engaging in a struggle with SP6 and E the condition of the black plastic bag not being sealed, covered and easily opened led to the irresistible ... of knowledge. Hence to my mind the prosecution has established a strong *prima facie* case of actual possession.

F **[56]** We agree with the trial judge.

[57] Proof of knowledge has always been a matter of inferences drawn from proved facts and circumstance. In *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597 the court held that "it should be borne in mind that proof of intention or knowledge is generally G inferred from proved facts and circumstance. It is difficult to do so by other means unless there is a clear admission by the person himself".

[58] In the light of what we have quoted above, we do not think H it will serve any purpose to dwell further on this issue. There is no merit in the submissions of learned counsel on the issue of possession. The second appellant's appeal on this ground must fail.

I **[59]** We allowed learned counsel for the second appellant to submit on common intention despite his admission that the issue was not brought up in the appellant's petition of appeal. Similarly learned counsel for the first appellant also drew our attention that he too, did not raise this issue in the first appellant's petition of appeal.

[60] While the first appellant's counsel submitted that the first appellant merely hailed the taxi and denied picking up exh. P8 from the boot of the taxi, the second appellant's counsel submitted that there was no communication or interaction between both of them. They did not speak to one another and there was no pre-arranged plan. Learned counsel also submitted that the learned trial judge did not touch on s. 34 of the Penal Code.

[61] We beg to differ with both counsel in all aspects raised on this issue. Contrary to learned counsel's submission, the learned trial judge did make a finding on s. 34. True that His Lordship never mentioned s. 34 in his judgment but his reference to common intention ought to be understood as being reference to s. 34 of the Penal Code. Addressing his mind on the issue of common intention at pp. 229 - 230 of the appeal record, the learned trial judge has penned the following passage in his written judgment:

> As for the evidence of common intention, in the absence of direct evidence, the circumstantial evidence shows that the place where both accused were arrested there were no one else except themselves. What were they doing in the early hours of the morning other than the 2nd accused conveying or transporting the drugs to the 1st accused who was already waiting at Block H, PKNS flat Jalan Kuching. It could not have been a mere coincidence that the 2nd accused happened to be driving near Block H and the 1st accused happened to be at the same place and at the same time. The Court rejected both the defence version as to how they came to be at the same place and at the same time on the morning of the incident.

[62] It is trite that the existence of common intention is a question of fact and may be proved by way of inference from the circumstances of the case and the proved facts. (see: *Mahbub Shah v. Emperor* AIR 1945 PC 118, *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17; [2010] 1 MLJ 749).

[63] The learned trial judge was right in saying that in the absence of direct evidence, circumstantial evidence and inferences to be drawn from the surrounding circumstances of the case may

A afford proof of common intention. We are in agreement with the learned trial judge that after having examined the factual matrix of the case, common intention between the two appellants was proven.

B **[64]** Again, the appellants cannot succeed on this ground.

[65] In the course of their submissions before us, we have invited both counsel for the appellants and learned Deputy Public Prosecutor to address us on the issue whether the court ought to invoke the proviso to s. 60(1) of the Courts of Judicature Act C 1964 ('CJA 1964').

[66] Learned deputy provided us with a very simple reply and answer to our questions by saying that the proviso should be used if the court finds there is merit in its usage. We thought that was D quite obvious and need no telling. Learned deputy however referred to us the case of *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129; [2006] 3 MLJ 193 where the Federal Court referred to the case of *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381; [2001] 1 MLJ 259 which relied on the proviso to s. 92(1) E of the CJA 1964 and held that as a general rule, the appellate court will in normal course of events, quash a conviction where there has been a misdirection. Exceptionally, it said, a conviction will be upheld despite a misdirection where the court is satisfied that a reasonable tribunal would have convicted the accused on F the available evidence on a proper direction. In other words, the court would still uphold the conviction despite the misdirection where no miscarriage of justice has been detected.

[67] In *Abdul Manaf*'s case, the Federal Court ruled that the G Court of Appeal ought to have applied the proviso to s. 60(1) of the CJA 1964 and upheld the conviction and sentence notwithstanding the misdirection by the learned trial judge.

[68] Learned counsel for the first appellant however strenuously argued before us that it was unfair to invoke the proviso because H there is no overwhelming evidence of trafficking against both the appellants and referred to the case of *Tunde Apatira & Ors v. PP* (*supra*) where the evidence against the accused was so overwhelming in that the drugs were found in the accused's stomach. In that case, the Federal Court invoked the proviso to s. 92(1) of the I CJA 1964 and upheld the conviction.

[69] Learned counsel also referred to the case of *PP v. Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113 where this court refused to invoke the proviso to s. 60(1) of the CJA 1964 on the ground that it was not a proper case for the court to do so. In *Ku Yahya*'s case this court held that there was a misdirection as to the burden of proof. It cannot be cured by the invocation of that proviso.

[70] We agree with Mr Hisyam that *Tunde Apatira* should be applicable only in straight forward cases where the evidence is overwhelming. We are always mindful of this fact and we will not readily rely on that case. In *PP v. Mohd Radzi Abu Bakar* (*supra*) in a judgment written by Gopal Sri Ram FCJ, the Federal Court has put a caution and reminder that *Tunde Apatira* was an exceptional case and the court has said so in its judgment. As happens in many criminal cases, *Tunde Apatira* was a case decided on its own peculiar facts. Counsel on both sides of the bar are therefore discouraged from treating it as laying down any new principle. (see p. 476 of the report).

[71] We are duty bound to take heed of those reminders. Reverting to the instant appeal before us, we have earlier stated that we found no misdirection by the learned trial judge and as such the invocation of the proviso to s. 60(1) of the CJA 1964 did not arise at all. Be that as it may, even if there was a misdirection by the learned trial judge, we are of the considered view that the instant appeals would be an appropriate and a fit and proper instance to invoke the said proviso.

[72] We dismissed both appeals and affirmed the convictions and sentences by the learned trial judge on both the appellants.